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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 42.

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT.

We do not concede that petitioner's conduct should be dealt with as that of one who was engaging, together with a group of 52 persons, in nothing more than a peaceful, orderly demonstration upon the sidewalks of the City of Birmingham without a permit. It is less than realistic to ignore the surrounding relevant circumstances. These include not only facts developed in the Record in this case, but also those shown in the opinions in the

related case of **Walker v. City of Birmingham** (1967), 388 U. S. 307, 87 S. Ct. 1824.[1]

Some of these revelant circumstances shown by the latter case were that petitioner, together with "many others", was involved in the so-called "Birmingham Movement" in 1963. Several arrests had been made for mass parading without a permit on April 6th and 7th and April 9th and 10th. On the latter date, an injunction was issued to enjoin mass picketing, mass parading, or mass demonstrating without a permit. In defiance of the injunction, a march or demonstration was called for Good Friday, April 12, 1963, with petitioner Shuttlesworth one of its leaders. Some fifty marchers came out of the church at 14th Street and 6th Avenue North, but a large crowd of Negroes were gathered on the outside. **Walker**, 388 U. S., at pages 340, 341. The latter was a crowd of some 1,000 to 1500, "clapping, hollering and whooping", and some of whom followed the marchers and spilled out into the street. This gathering was promoted at a meeting of the "Movement" held the night before at which one of the leaders proclaimed: "Injunction or no injunction, we are going to march tomorrow." **Walker**, 388 U. S., at pages 310, 311.

Earlier the same day, April 11, 1963, in a press release signed by this petitioner and other leaders of the "Movement", they defied the injunction restraining them from violating Section 1159 by holding mass parades without a permit but also openly declared they would not obey laws they considered unjust. **Walker**, 388 U. S. 323, 324. The mass march or procession held April 12, 1963, directly carried out this defiant threat to march, which they did without making any attempt to obtain a permit,

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[1] The Good Friday, 1963 parade or demonstration considered in **Walker** was the identical parade or demonstration for which petitioner was convicted here. 388 U. S. 310, 311, 319; Petitioner's Brief in that case, at page 37. Note: Petitioner Shuttlesworth was also one of the petitioners in **Walker**.

in violation of the ordinance and thus in violation of the injunction. **Walker**, 388 U. S. 315. That it could not be properly described as a mere peaceful, orderly march of 52 civil rights demonstrators upon the sidewalks of Birmingham is obvious.

It was a part of the "Movement" and a part of a planned and controlled takeover of the sidewalks and streets by a mob of some 1,000 to 1,500 in furtherance of the "Movement", in violation of the ordinance and the injunction, ultimately resulting in violence and injury to persons and property. **Walker**, 388 U. S. 310, 311. It is perhaps true that the March of April 12th was slightly less disorderly than the one that followed on April 14, 1963. However, "there was a lot of loud hollering going on and some people threw rocks" in the march of April 12th, and a lot of "dodging going on" (A. 29). Officer Higginbotham, who was stationed at 18th Street and 5th Avenue North, some five blocks from the point of origin of the parade or demonstration, and who testified he stopped it between 17th and 18th Streets on 5th Avenue, stated that the formal part of the parade "were four to six across the sidewalk, all the way across the sidewalk on the North side of 5th Avenue heading east". These were on the north sidewalk of 5th Avenue North, but there was a large crowd approaching from the back of them. They were all over." The group gathering on the opposite side and alongside were not white and black but were all black. On being asked whether he stopped the other group, Higginbotham replied, "Every one stopped at this time that I brought it to a halt" (A. 23). It was a mass moving together and obviously was obstructing the sidewalk and street.

The defiant marches of April 12th and April 14th were conducted by the "Movement", of which petitioner was a highly ranked leader, without making any effort to dis-

solve the injunction restraining them from holding such a mass parade without a permit required by Section 1159. Thus, they deliberately refused to avail themselves of an easily available and expeditious way to quickly test the constitutionality of the ordinance on its face and as applied.

While the Court of Appeals of Alabama, in a 2 to 1 decision, declared Ordinance 1159 unconstitutional, this was reversed by the Alabama Supreme Court in a unanimous decision. It is significant that the Alabama Supreme Court, in its rehearing, had the benefit of this Honorable Court's decision in **Walker**, which was rendered subsequent to that of the Alabama Court of Appeals. **Shuttlesworth v. City of Birmingham**, 281 Ala. 542, 206 So. 2d 348, 352, 353; **Walker v. City of Birmingham**, 388 U. S. 307, 316, 317, 87 S. Ct. 1824, 1830.

Briefly, we here comment on the "Questions Presented". In a nutshell, the question presented here for determination is whether or not in the light of the facts in this case the Supreme Court of Alabama, in deciding this case (206 So. 2d 348, 354), properly relied upon and applied **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210, the established line of cases upholding the right of municipalities to properly regulate the use of its streets and sidewalks for safety and convenience of the public, as distinguished from the co-existent and mutually compatible line of cases relating to censorship of speech or press activities, such as **Lovell** (handing out handbills), **Staub** (soliciting union memberships in private homes), or **Freedman** (previewing movies to approve or disapprove their showing).

In his "Questions Presented", petitioner has taken a somewhat more sophisticated approach. Statements 1 and

2 appear, to overlap if, indeed, 2 is not in essence the same thing as 1. While 3 injects a new issue not presented in his petition for certiorari and seems to be somewhat of an afterthought, we think the questions posed in 1, 2 and 3 are due to be answered in the negative. In our Argument, we shall follow the order used by petitioner, although this will necessitate treatment of some of the same cases in more than one of the three sections of our brief.

SUMMARY OF ARGUMENT.

I.

A. The Supreme Court of Alabama, in the opinion under review, upheld the conviction of petitioner, one of the leaders of the "Movement" in Birmingham which came shortly after and was patterned after the Albany, Georgia "Movement", using the same tactics of takeover of the streets by repeated mass demonstrations where formal marchers were about 40 to 60, but the disorderly psuedo spectators assembled by the "Movement" which actually engaged in the violence numbered in the thousands.

This technique is illustrated by the revealing statement of the United States Court of Appeals, Fifth Circuit, in **Kelly v. Page**, 335 F. 2d 114, concerning the Albany "Movement":

> "The last big demonstration was on July 24, 1962. There were only forty marchers but from 3,000 to 4,000 spectators participated in the ensuing confusion and disorder . . . There was testimony that Negro spectators on both sides of the street would run out into the street and spit at the officers."

Notwithstanding the injunction issues by the State Circuit Court, petitioner and his followers engaged in such disorderly mass parades or processions on April 12th and April 14th, 1963 which became violent mobs in open defiance of the injunction, all Alabama Courts, and all laws they considered unjust.

The conviction of petitioner was for violation of Sec. 1159 of the Birmingham City Code, which is here under attack as being facially unconstitutional as a void prior restraint upon exercise of free speech. This ordinance is set out in the Appendix hereto, at page 73. Its clear and manifest purpose is to conserve safety and conven-

ience in the use of the City streets, including sidewalks, an obligation and duty of the municipality for the benefit of the public as a whole, including petitioner and his followers. **Cox v. New Hampshire** (1941), 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; **Cox v. Louisiana** (1965), 379 U. S. 536, 85 S. Ct. 453; **Walker v. City of Birmingham** (1967), 388 U. S. 307, 87 S. Ct. 1824. This duty is imposed upon "municipal authorities as trustees for the public (who) have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose for which streets are dedicated." **Schneider v. State of New Jersey** (1960), 308 U. S. 147, 60 S. Ct. 146. The City also had a duty to protect the demonstrators in the lawful exercise of their constitutional rights. **Burton v. Wilmington Parking Authority et al.**, 365 U. S. 715, 81 S. Ct. 856, 861, 6 L. Ed. 2d 45; **United States v. U. S. Klans et al.** (1961), 194 Fed. Supp. 897 (D. C., M. D., Ala. N. D.).

In **Lovell-Staub-Freedman**, the line of cases relied upon by petitioner, the matters at issue are quite different. They involve pure speech situations such as distribution of handbills, soliciting members of a union organization in private homes, and censorship of movies. Section 1159 is not facially void as an improper prior restraint. The application for a permit required by it was essential to provide necessary information to enable the City to properly perform its duties to the public and to demonstrators.

B. **Cox v. New Hampshire**, 312 U. S. 569, *supra*, is not in conflict with **Lovell v. Griffin**, 303 U. S. 444. Mr. Chief Justice Hughes, who wrote both opinions, cited **Lovell** in **Cox**. They simply have different areas of application. Certainly **Cox** stands as a strong and healthy precedent for use of prior restraint in regulating the public forum "as it relates to use of streets, including sidewalks." Kalven, "The Concept of the Public Forum," the Supreme Court Review 1965, pages 28-29.

C. We compare **Cox** with the instant case, in the light of **Walker v. City of Birmingham** (1967), 388 U. S. 307, 87 S. Ct. 1824. It is clear the Supreme Court of Alabama properly relied upon these cases holding Section 1159 not facially unconstitutional and in upholding Petitioner's conviction for its violation. Facts in **Cox** and the instant **Shuttlesworth** case are remarkably similar. The formal part of the instant parade was on the sidewalk as in **Cox**. The number of paraders in the present case was about three times the number in each of the separate units in **Cox**. In **Cox** the licensing authority was granted **unlimited** discretion to issue or refuse the permit. In the instant case such discretion was not unlimited but related to public welfare, peace, safety, etc. In both cases the Supreme Courts of New Hampshire and Alabama, respectively, narrowly limited such discretion to a matter of safety and convenience in the use of the streets, including sidewalks. Please see Appendix, pages 73-74.

Walker recognized "the strong interest of state and local governments in regulating the use of their streets and other public places" (388 U. S. 315, 87 S. Ct. 1829), and also suggested the Alabama Courts might give "the licensing authority a narrow and precise scope, as did the New Hampshire Courts in **Cox v. State of New Hampshire** and **Poulos v. New Hampshire**. . . . Here, just as in **Cox** and **Poulos**, it could not be assumed that this ordinance was void on its face" (358 U. S. 316, 317, 87 S. Ct. 1830).

The test of facial constitutionality of an ordinance or state statute by this Honorable Court is its constitutionality after the state court has construed it. **Cox v. New Hampshire**, 312 U. S. 569, *supra*; **Kovacs v. Cooper** (1949), 336 U. S. 77, 85, 69 S. Ct. 448, 452; **Dombrowski v. Pfister**, 380 U. S. 479. Such narrowing construction is properly applied to conduct occurring prior thereto. **Dombrowski**, 380 U. S., at page 491, 85 S. Ct., at 1123.

D. Section 1159 is valid as construed by the Supreme Court of Alabama. The interest of the municipality in the protection of public convenience and peace in the primary uses of streets and parks for the purposes for which they were dedicated should be weighed as against the interest in free expression. **Nieomatko v. State of Maryland** (1951), 340 U. S. 268, 276, 280, 71 S. Ct. 328, 330, 332. Also it is valid as construed because it does not deal with pure speech but with "speech plus"; that is, parading or patrolling or picketing, which may have some elements of communication of ideas but is also much more in that it may well result in confusion, disorder and violence as in this case. **Cox v. Louisiana**, 379 U. S. 554, 85 S. Ct. 464; **Cox v. Louisiana**, Mr. Justice Black dissenting, 379 U. S., at page 584, 85 S. Ct. 671.

Whether the "weighing of interests" or the "speech plus", or both theories are applied, Section 1159 as construed is valid. **Cox v. New Hampshire**, 312 U. S. 569, *supra*; **Walker v. City of Birmingham**, 388 U. S. 307.

The rule is well established by state and federal cases that an ordinance or statute will be narrowly construed, if it can reasonably be done, to save its constitutionality. "Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from possible constitutional infirmity." **Kovacs v. Cooper** (1949), 336 U. S. 85, 69 S. Ct. 452; **Chaplinsky v. State of New Hampshire** (1942), 315 U. S. 568, 62 S. Ct. 766; **Cox v. New Hampshire** (1941), 312 U. S. 569, 61 S. Ct. 762; **Shuttlesworth v. City of Birmingham** (1967), 281 Ala. 542, 206 So. 2d 348.

II.

A. Section 1159 as written provided "fair notice" to petitioner that if he participated in a parade without first obtaining a permit he would be arrested and convicted. The standard for statutory "fair notice" is spelled out in **Lanzetta v. New Jersey**, 306 U. S., at page 453, 59 S. Ct., at page 619:

> ". . . [T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . ."

The first paragraph of Section 1159 proscribes parading without a permit. The second paragraph deals with the administrative procedures for granting or denying the permit. Insofar as "fair notice" is concerned, the only portion of Section 1159 that is material is the first paragraph. The first paragraph reads:

> "Sec. 1159. Parading.
>
> "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the Commission."

The language employed in the first paragraph of Section 1159 is sufficiently explicit to inform petitioner that to participate in a parade without a permit is proscribed. Thus, petitioner had "fair notice" as required by "due process".

B. Petitioner also contends that as written, and under the prior decision of this Honorable Court, Section 1159 was unconstitutional because it vested excessive discretion in the Commission to deny the permit and therefore

he could ignore the plain language of the act and parade without a permit. Thus he contends that since the prior decision of this Court taught him he could ignore Section 1159, he did not have fair notice in spite of the plain language of the act.

It might well be that the state court construction of Section 1159 limiting the discretion vested in the Commission to deny permits was necessary to validate the enactment, but such construction is not only proper but desirable. The case of **Winters v. New York**, 333 U. S. 507, 68 S. Ct. 665, makes it clear that Section 1159 means what the Alabama Supreme Court construed it to mean. In speaking of the effect of a state court's interpretation of an act in the same case, this Honorable Court in **Winters**, at 333 U. S., page 514, 68 S. Ct., page 669, said:

> "The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature."

This rule has been recognized in many cases, including **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824.

C. The prior decisions cited and relied upon by petitioner as holding that he could rely on Section 1159 as written rather than as construed, and therefore ignore the parade permit, fall into four general classifications. These are (a) the movie censorship cases, (b) distribution of literature and solicitation cases, (c) public assembly cases, and (d) the remaining cases.

(a)

The movie censorship cases cited and relied upon by petitioner are **Interstate Circuit, Inc. v. City of Dallas**, 20 L. Ed. 2d 225; **Joseph Burstyn, Inc. v. Wilson**, 343 U. S. 495, 72 S. Ct. 777; **Gelling v. Texas**, 343 U. S. 960, 72 S. Ct. 1000; **Superior Films, Inc. v. Department of Education**, 346 U. S. 587, 74 S. Ct. 286; **Commercial Pictures Corp. v. Regents**, 346 U. S. 587, 74 S. Ct. 286; **Holmby Production, Inc. v. Vaughn**, 350 U. S. 870, 76 S. Ct. 117; and **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734.

The foregoing movie censorship cases all involve enactments creating bodies to censor the content of speech, that is movies, and as such involve pure speech. Section 1159 is an enactment designed to regulate traffic and any regulation of speech incident thereto is strictly speech intermingled with conduct. The fact that strict standards are required of regulations concerned with pure speech is pointed out in both **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Amalgamated Food Emp. U. Local 590 v. Logan Valley Plaza**, 88 S. Ct. 1601 (1968).

Mr. Justice Black and Mr. Justice Douglas would not tolerate censorship under any conditions, **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734; **Interstate Circuit, Inc. v. Dallas**, 20 L. Ed. 2d 225; and on the other hand Mr. Justice Black would not afford any First Amendment protection to persons who parade on the streets. Thus, the distinction between pure speech cases and those involving parading and patrolling and picketing is dramatized.

(b)

The distribution of literature and solicitation cases relied upon by petitioner are as follows: **Lovell v. Griffin**, 303 U. S. 444, 58 S. Ct. 666; **Schneider v. New Jersey**, 308 U. S. 147, 60 S. Ct. 146; **Largent v. Texas**, 318 U. S. 418, 63 S. Ct. 667; **Jones v. Opelika**, 316 U. S. 584, 62 S. Ct. 1231, vacated by 319 U. S. 103, 63 S. Ct. 890; **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277; **Cantwell v. Connecticut**, 310 U. S. 296, 60 S. Ct. 900; **Hague v. C. I. O.**, 307 U. S. 496, 59 S. Ct. 954; **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274.

In 1941 this Honorable Court upheld an enactment virtually the same as Section 1159 in the case of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, and in doing so recognized that the foregoing cases had no application to enactments such as Section 1159. This Honorable Court cited in **Cox** each and every of the foregoing cases that had been decided prior to **Cox**. The distinction made there, and equally applicable here, was that the enactment involved in **Cox** was narrowly construed in the same case, so as not to confer an excessive discretion on the official charged with issuing the permit. The cases not cited in **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, except for **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276, and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274, were all distinguished for this same reason in **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277. These cases were distinguished also in **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453, where this Honorable Court held that because enactments regulating the use of city streets to assure the safety and convenience of the people in their use is an exercise of governmental responsibility to insure order, they involved "speech plus", whereas the cases relied on by petitioner were examples of enactments that

did not regulate city streets to assure the safety and convenience of the people in their use.

The cases of **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276, and **Tucker. v. Texas**, 326 U. S. 517, 66 S. Ct. 274, turned on the authority of a person in charge of a private company owned town and Federal housing project respectively to exclude those whom they did not want from such property to the complete loss of their freedom of speech and religion.

(c)

The public assembly cases relied upon by petitioner are as follows: **Saia v. People of State of New York**, 334 U. S. 558, 68 S. Ct. 1148; **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 313; and **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325.

As heretofore noted under II-C (b), the case of **Staub v. Baxley**, 355 U. S. 313, 78 S. Ct. 277, distinguished **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 313; and **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325, because the enactments involved in those cases vested an unbridled discretion in the official charged with granting or denying a permit to arbitrarily deny the right of public assembly. **Saia v. New York**, 334 U. S. 558, 68 S. Ct. 1148, is distinguished on the same ground. As construed, Section 1159 does not vest an unbridled discretion in the Commission to either grant or deny the permit and consequently this case should be controlled by **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762.

(d)

The remaining cases relied upon by petitioner are **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211.

Cox v. Louisiana, 379 U. S. 536, 85 S. Ct. 453, specifically recognizes the right of a municipality to regulate the use of its streets and recognizes that parades are "speech plus" and therefore can be regulated. **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211, did not involve speech, either "pure" or "plus", and consequently has no relevance. **Shuttlesworth** turned on a question of fair trial.

D. The cases next treated herein were cited by petitioner for analogy and are not in point.

Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731; **Johnson v. New Jersey**, 384 U. S. 719, 86 S. Ct. 1772; and **O'Connor v. Ohio**, 385 U. S. 92, 87 S. Ct. 252, simply held that cases such as **Mapp v. Ohio**, 367 U. S. 643; **Escobedo v. Illinois**, 378 U. S. 478; **Miranda v. Arizona**, 384 U. S. 436; and **Griffin v. California**, 380 U. S. 609, which cases establish new rules of criminal procedure and overturned prior procedures legally relied upon by public officials until these decisions were decided, would not be given retroactive effect.

Raley v. Ohio, 360 U. S. 423, involved facts establishing entrapment and is of no consequence here.

James v. United States, 366 U. S. 213, refused to sustain the conviction of one convicted of attempting to evade federal income taxes, because there was a prior decision rendered by this Court, and relied upon by petitioner, holding that no taxes were due on the particular source of income. This Court changed the law prospectively to make such fund taxable but would not uphold petitioner's conviction.

E. Petitioner had "fair notice" that his march in formation along the city sidewalk was in violation of the proscription in Section 1159. **Cox v. New Hampshire,** 312 U. S. 569, 61 S. Ct. 762, involved a smaller number of people than participated in this parade, and the **Cox** parade also took place on that portion of the street known as the sidewalk. This Honorable Court, in **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, considered this same parade to be parading without a permit and sustained this very petitioner's conviction for contempt for violating an injunction restraining him from participating in any parades without a permit as required by Section 1159.

The General City Code of Birmingham is also clear to the effect that the sidewalk is part of the street, because under Section 2 of said Code we find:

> "Sidewalk. The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

III.

A. The procedural safeguards required of enactments creating censorship systems to review books and movies prior to their dissemination or showing are different from the necessary standards to govern the administrative discretion exercised in the grant or denial of a parade permit. When an enactment creates a system to censor what may be said in advance of it being said, that enactment must provide a prompt administrative proceeding, and if the decision is against the exercise of speech a prompt judicial review to be instituted by the censorship officials. **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734.

The rule in regard to enactments seeking to regulate traffic by requiring a permit to participate in a parade rests on entirely different considerations. Such traffic en-

actments must be narrowly drawn so as to limit the discretion of the official charged with issuing said permit to the extent that he can only deny the permit to assure the safety and convenience of all the people in their use of the streets. **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; and **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453.

Enactments creating censorship systems deal with "pure speech", whereas enactments regulating the use of the streets by requiring parade permits deal with speech intermingled with conduct. **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (1968); and **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453.

B. The normal procedures provided by state law are adequate methods to review an administrative denial of a parade permit. This is the holding of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824. Thus, a mandamus proceeding in Alabama would be sufficient.

Mandamus is afforded an expedited process of review in Alabama. See Alabama Supreme Court Rule 47, Title 7, Appendix, Code of Alabama 1940, Recompiled 1958.

In addition to a mandamus proceeding, petitioner in this particular instance could have obtained an expedited review in equity. At the time of his arrest in this case, petitioner was under an injunction restraining him not to participate in a parade without the permit required by Section 1159. **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824. A motion to "dissolve" or "modify" the injunction offered petitioner another method of expedited review in this case. **Walker v. City of Birmingham**, 388 U. S. 317, 87 S. Ct. 1830, makes this observation and points out that Rule 47, referred to above as afford-

ing an expedited review insofar as an injunction proceeding is concerned, also provides an expedited process of review had Petitioner chosen to file a motion to "dissolve" or "modify" the injunction.

Alabama Circuit Courts, since **Walker v. City of Birmingham**, 388 U. S. 307, also know that the decisions of this Court require an expedited review in such cases, and these courts will comply with the **Walker** decision. If they should fail in this regard, the Alabama Supreme Court, under the authority it has to supervise inferior courts, will see that they do follow the mandate of **Walker.** Alabama Constitution of 1901, Art. 6, Section 140.

ARGUMENT.

I.

Petitioner's Conviction Should Not Be Reversed Because of Facial Unconstitutionality as a Void Prior Restraint Upon Free Expression; and Petitioner Should Be Punished for Failing to Comply With Its Permit Requirement.

A.

Introductory Statement.

Many cases are cited by petitioner in the effort to sustain the affirmative of the above proposition. We have attempted in Part II of our Argument, post pages 35 to 59, to discuss and demonstrate the inapplicability to the instant case of these numerous cases cited by him. Although we shall comment on them again in Part II, we shall here consider primarily the applicability of **Cox v. New Hampshire** (1941), 312 U. S. 569; **Cox v. Louisiana** (1965), 379 U. S. 536, 558; and **Walker v. City of Birmingham** (1967), 388 U. S. 307, a line of cases involving the right of municipalities to reasonably regulate pedestrian and vehicular traffic by requiring a permit for parading and patrolling on its streets, sidewalks and other public ways, as distinguished from the **Lovell-Staub-Freedman** line of cases, which have no application to our case.

B.

Cox vs. New Hampshire
Versus
Lovell vs. Griffin.

Petitioner has bemoaned the demise of **Lovell** if **Cox** is accepted and applied in this case. Requiem for **Lovell** now is inappropriate because it is either premature or a quarter of a century too late. Mr. Chief Justice Hughes delivered the opinion of the Court in both cases. The latter case was decided March 31, 1941, the former March 28, 1938, a difference of exactly three years and three days. **Cox** was a unanimous decision of the Court. **Lovell** was a unanimous decision except that Mr. Justice Cardoza did not sit. The Court, in **Cox**, was composed of Mr. Chief Justice Hughes and Mr. Justice McReynolds, Mr. Justice Stone, Mr. Justice Roberts, Mr. Justice Black, Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Murphy. The Court, in **Lovell**, included Mr. Chief Justice Hughes and five of the above named Justices, i. e., Mr. Justice McReynolds, Mr. Justice Stone, Mr. Justice Roberts, Mr. Justice Black and Mr. Justice Reed.

Since the first case cited in **Cox v. New Hampshire**, 312 U. S. 569, 574, is **Lovell v. Griffin**, 303 U. S. 444, 451, it would be most unusual indeed if there is a violent conflict in the principles enunciated in **Cox** that it would have occurred to at least one of the six members of the Court sitting in both cases if **Cox** indeed killed **Lovell**. The Court which established the principle and application of **Lovell** knew the difference between it and the principle and application of **Cox** (312 U. S., at pages 574, 575, 61 S. Ct. 765):

> "[2-4] Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society

maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinion. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places. Lovell v. Griffin, 303 U. S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949; Hague v. Committee for Industrial Organization, 307 U. S. 496, 515, 516, 59 S. Ct. 954, 963, 964, 83 L. Ed. 1423; Schneider v. State of New Jersey, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155; Cantrell v. Connecticut, 310 U. S. 296, 306, 307, 60 S. Ct. 900, 904, 84 L. Ed. 1213, 128 A. L. R. 1352."

The progeny of **Cox** includes such cases as **Cox v. State of Louisiana**, 379 U. S. 536 and 379 U. S. 559; **Adderly v. State of Florida**, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824. On the other hand, the progeny of **Lovell** includes **Staub v. Baxley**, 355 U. S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302; and perhaps to some extent **Freedman v. State of Maryland**, 380 U. S. 51, 85 S. Ct. 734, although the latter case is concerned with censorship of movies and in no manner related to any sort of use of streets or public ways. The point, however, is that the respective doctrines of the two lines of cases do not conflict but are clearly distinguishable.

In an article by Professor Harry Kalven, Jr., of the University of Chicago Law School,[2] he considers the public forum cases beginning with **Lovell** and on through the two cases of **Cox v. Louisiana**, 379 U. S. 536 and 379 U. S. 559. He notes the emphasis of Mr. Justice Goldberg on "speech plus" as opposed to "pure speech" in describing the activity in a demonstration, parade or march upon public streets, sidewalks and public ways, especially in the vicinity of a court house. **The Supreme Court Review**, 1965, page 22. At page 26 he expresses the idea that "speech plus" and "pure speech", and the "weighing of conflicting interests between municipal control of streets and First Amendment Freedom" theories might well give way to the Meiklejohn Analogy to the employment of Roberts Rules of Order in a town meeting to provide necessary order which inherently requires reasonable restraints to freedom of speech.[3]

Professor Kalven then evaluates **Cox v. New Hampshire** (op. cit. note 2, supra, pages 28-29):

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[2] "The Concept of the Public Forum", the Supreme Court Review 1965, pages 1-32.

[3] Meiklejohn, Political Freedom, 24-28.

"But there is little if anything left today to the idea that prior licensing is bad per se, regardless of the criteria used. It now appears that the historical reaction was against general licensing with unlimited or unspecified grounds for exercise of discretion. The recent Times Film case has definitively put to rest any question whether all prior restraints are necessarily bad. **And, in any event, Cox v. New Hampshire stands as a strong and healthy precedent for use of a prior restraint, at least in regulating the public forum**" (Emphasis added).

Regardless of which of the three tests is applied, **Cox** stands firm as a healthy precedent in cases like the present one.

C.

The New Hampshire Cox Cases (a Comparison With This Case in the Light of Walker).

Petitioner stands convicted of violating Section 1159 of the General City Code of Birmingham of 1944, which is set out in full in the Appendix hereto. Section 1159 proscribes participating in a parade or procession without permit. The same conduct is proscribed by the enactment involved in **Cox**. Each involved a conviction for violation by the respective petitioner of a criminal statute or ordinance construed by the respective Supreme Courts of New Hampshire and Alabama narrowly and precisely after arrest and conviction.

This Court, in the case of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, affirmed the State court's decision in **State v. Cox**, 16 A. 2d 508, in the only case decided by this Court we have found that is squarely in point with our case. It is readily apparent from reading these two cases that both the conduct of petitioner here and the ordinance involved herein are remarkably similar to

the conduct and enactment involved in the New Hampshire case. In both instances, the parade or procession took place on the sidewalk portion of the street. In neither instance was an effort made to secure a permit or license for the parade. In both instances the parade or procession was a prearranged affair. In **State v. Cox,** the court determined that the defendants understood that under the statute a permit was required. No serious contention could be made in this case that petitioner did not understand that a permit was required, and **Walker v. City of Birmingham,** 388 U. S. 307, 315, 87 S. Ct. 1824, 1829 (1967), involving this same parade, leaves no doubt on this score.

The statute for which **Cox** was convicted of violating, as written by the Legislature of New Hampshire,[4] conferred complete and unbridled discretion in the Licensing Board to license or refuse to license parades or processions on the public streets of Manchester, New Hampshire:

"By motions and exceptions, appellants raised the question that the statute was invalid under the Four-

[4] The statute construed in this case was construed for the first time by the New Hampshire Supreme Court after Cox was convicted for violating it. He ultimately appealed to the United States Supreme Court, where a unanimous Court affirmed his conviction. The New Hampshire statute involved appears in **Cox v. State of New Hampshire,** 312 U. S. 571, 572, 61 S. Ct. 763, 764. Sec. 2 thereof is quoted in the body of the opinion: "No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any grounds abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town or from a licensing committee for cities hereinafter provided for." Secs. 3, 4 and 5 of this Act appear in Footnote 1, 312 U. S. 573, 61 S. Ct. 764, supra. These sections provide for the creation of the Licensing Board, for the written application for the permit specifying the date and hour of the parade or procession, and for the payment of a license fee for each parade or procession up to $300 and a penalty for its violation of a monetary fine not to exceed $500.

teenth Amendment of the Constitution of the United States in that it deprived appellants of their rights of freedom of worship, freedom of speech and press, and freedem of assembly, vested unreasonably and unlimited arbitrary and discriminatory powers in the licensing authority, and was vague and indefinite."

Those contentions were overruled by the New Hampshire Supreme Court in **State v. Cox,** 191 New Hampshire ..., 16 A. 2d 508—**Cox** (1941), 312 U. S. 569, 571.

It is crystal clear that the statute as written by the New Hampshire Legislature was constitutionally questionable on its face. But the United States Supreme Court did not consider it as written, but only as the unbridled discretion of the Licensing Board was appropriately narrowed and limited by the Supreme Court of New Hampshire.

Mr. Justice Stewart, speaking for this Honorable Court in **Walker v. City of Birmingham** (1967), 388 U. S. 307, 316, 87 S. Ct. 1830, suggests Section 1159 because of generality of language used would raise substantial constitutional issues. However, he recognized that a State court construction of the ordinance might well give it a narrow and precise application to remove such constitutional problems. It was the failure of the **Walker** petitioners to avail themselves of the opportunity to seek state court construction by a motion to dissolve the injunction which prompted his statement (388 U. S., at pages 316, 317):

"The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State of New Hampshire and Poulos v. State of New Hampshire, both supra. Cf. Shuttlesworth v. City of Bir-

mingham, 382 U. S. 87, 91, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176; City of Darlington v. Stanley, 239 S. C. 139, 122 S. E. 2d 207. Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face."

If we are able to understand the English language, when using the sentence, "Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face", this Honorable Court was saying two things: First, that the question of whether or not a given ordinance or state statute is void upon its face is not determined by this Honorable Court as it was written but as it was construed by the State courts; and, second, that Section 1159 would admit of a narrowing construction to save its constitutionality just as was true of the statute in **Cox.** Please see **Kovacs v. Cooper** (1949), 336 U. S. 77, 85, 69 S. Ct. 448, 452, where conviction for violation of an ordinance prohibiting use on public streets, alleys or thoroughfares of sound trucks was upheld by this Court because it had been narrowly construed by the State Court in the decision appealed from to mean only sound trucks emitting a "loud and raucous" noise in its application to the conduct of the defendant. This case also notes the contrast between statutes or ordinances aimed at censorship of speech and those designed to promote public safety or convenience. Said Mr. Justice Reed (336 U. S. 82, 83, 69 S. Ct. 451, 452):

"When ordinances undertake censorship of speech or religious practices before permitting their exercise, the constitution prevents their enforcement" but "the police power of a state extends beyond health, morals and safety and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of the community"; and at 336 U. S. 88, 69 S. Ct. 454: "To enforce freedom of speech in dis-

regard of the rights of others would be harsh and arbitrary."

Mr. Justice Reed in **Kovacs v. Cooper**, also, perhaps more significantly, observes (336 U. S. 85, 69 S. Ct. 452):

"We accept the determination of New Jersey that Sec. 4 applies only to vehicles with sound amplifiers emitting loud and raucous noises. **Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from possible constitutional infirmity.** Cox v. New Hampshire, 312 U. S. 569, 575, 576, 61 S. Ct. 762, 765, 85 L. Ed. 1049, 133 A. L. R. 1396; Cf. United States v. C. I. O., 335 U. S. 106, 120, 68 S. Ct. 1349, 1356" (Emphasis added).

Before returning to **Walker**, we comment further on the well recognized rule that courts indulge a presumption of validity in considering a statute or ordinance. **Shuttlesworth v. City of Birmingham**, 281 Ala. 542, 206 So. 2d 348, 350; **Goldblatt v. Town of Hempstead** (1961), 369 U. S. 590, 595-596, 82 S. Ct. 987, 8 L. Ed. 2d 130; **Fleming v. Nestor** (1960), 363 U. S. 603, 611, 80 S. Ct. 1367, 4 L. Ed. 2d 1435; **Landry v. Daley** (1968), 280 Fed. Supp. 938, 967 (Three Judge District Court, N. D. of Ill., E. D.); **Sobel v. Adams** (1962), 208 Fed. Supp. 324 (S. D. Fla).

Also, the well established rule is that a narrow interpretation of a statute or ordinance will be adopted where necessary to save it from unconstitutionality. **Shuttlesworth v. City of Birmingham** (1967), 281 Ala. 542, 206 So. 2d 348, 350; **Chaplinsky v. State of New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; **Cf. United States v. Harriss** (1954), 347 U. S. 612, 74 S. Ct. 808, 98 L. Ed. 989, **Landry v. Daley** (1968), 280 Fed. Supp. 938, 967 (Three Judge Court, N. D. Ill., E. D.).

Mr. Justice Harlan, dissenting in **Dombrowski v. Pfister** (1965), 380 U. S. 479, beg. 498, 85 S. Ct. 1116, beg. 1127, disagrees with the majority of five members of this Honorable Court in holding the United States District Court

should enjoin state prosecutions under the Louisiana Subversive Activities and Communist Control Law and its Propaganda Control Law pending non-criminal proceedings for state declaratory judgments narrowly construing such laws, and further holding and declaring two sections of one of said acts [364 (4) and 364 (7)] facially void and unenforceable, apparently because they were deemed not to admit of any saving construction by any court.[5] Mr. Justice Harlan pointed out that state and federal courts alike have a duty to give a narrowing construction to an ordinance or statute in the effort to save as much of it as possible. He cites: **Fox v. State of Washington**, 236 U. S. 273, 35 S. Ct. 383; and **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760, 99 L. Ed. 1165.

Mr. Justice Brennan, speaking for the majority in **Dombrowski v. Pfister**, 380 U. S. 479, *supra*, recognized that ordinarily a state court construction of a state statute should be obtained before it is considered by this Court. A criminal proceeding would be preferred in ordinary circumstances to accomplish such result. However, the federal injunction and the state declaratory judgment method of obtaining properly narrowing construction in the state courts was considered necessary because the charge that enforcement of such statutes for purposes of harassment without expectation of ultimate successful prosecution was an issue and because many different criminal prosecutions would be required to illuminate "the contours of an otherwise vague prohibition". Mr. Justice Brennan, in 380 U. S., at page 491, 85 S. Ct. 1123, then in the text and Note 7, elaborated on the non-applicability of the doctrine of abstention as follows:

> "As we observed in Baggett v. Bullitt, supra, 377 U. S. at 378, 84 S. Ct., at 1326, this cannot be satisfactorily done through a series of criminal prosecutions,

[5] A statute substantially identical to 364 (4) had been previously invalidated by this Court, 380 U. S. 494.

dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecution, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others. Here, no readily apparent construction suggests itself as a vehicle for **rehabilitating the statutes** in a single prosecution, and appellants are entitled to an injunction. The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions.[7]

"On this view of the 'vagueness' doctrine, it is readily apparent that abstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the **conduct charged** in the indictments **is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of 'hardcore' conduct that would obviously be prohibited under any construction.**" (Emphasis added.)

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[7] Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, see Poulos v. State of New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105; Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, provided such application affords fair warning to the defendants, see Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888; cf. Harrison v. NAACP, 360 U. S. 167, 179, 79 S. Ct. 1025, 1031, 3 L. Ed. 2d 1152.'

Possibly a more direct statement of Mr. Justice Brennan in **Dombrowski** of the point we are making—that unless the statute or ordinance is on its face so invalid that no reasonable construction could save it from unconstitutionality a state statute or ordinance is by this Honorable Court deemed facially unconstitutional only after the state courts have had opportunity to give such narrowing construction—appears at page 497 of 380 U. S. (1126 of 85 S. Ct.):

> "The precise terms and scope of the injunctive relief to which appellants are entitled and the identity of the appellees to be enjoined cannot, of course, be determined until after the District Court conducts the hearing on remand. The record suffices, however, to permit this Court to hold that, **without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face**; until an acceptable limiting construction is obtained, the provisions cannot be applied to the activities of SCEF, whatever they may be" (Emphasis added).

We now return to **Walker**. In the light of the language used by Mr. Justice Stewart, speaking for the majority, it is clear the doctrine of **Cox** and **Poulos** apply to this case rather than that of **Lovell-Staub-Freedman**. In parade permit cases which concern safety and convenience in the use of the streets, sidewalks and public ways, the "hard-core" conduct to which Mr. Justice Brennan refers in **Dombrowski v. Pfister**, 380 U. S., at pages 491-492, and in his concurring opinion in **Shuttlesworth v. City of Birmingham** (1965), 382 U. S. 87, 99, 86 S. Ct. 211, is the act of participating in a parade or procession without making application for and securing the permit required by Section 1159. Any overbreadth of discretion in the City Commission in its issuance was removed by the Supreme Court of Alabama. The only issue now before this

Honorable Court in harmony with the reasoning of **Dombrowski, Kovacs, Poulos** and **Cox** is whether the Alabama Supreme Court has so construed 1159 that such discretion must be exercised within sufficiently narrow limits that the ordinance shall operate not as a device for censorship or to control or limit what is said but shall limit its operation in a non-discriminatory way to enable the City to perform its duty of preserving safety and convenience of the public in the use of its streets, including sidewalks and public ways, consistent with the use for which they were intended. It is immaterial that the ordinance may have been questionable on its face prior to such construction, and it is immaterial that this construction was given after the arrest of petitioners.

If this ordinance was foredoomed to complete destruction because it was void and unconstitutional on its face to the extent no reasonable state court construction could possibly save it, then the words of this Honorable Court quoted and relied upon by the Supreme Court of Alabama in its opinion and decision in this case would, we submit, be most strange if not entirely inexplicable.[6]

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[6] We quote from **Shuttlesworth v. City of Birmingham,** 206 So. 2d 348, at page 353, in which the Alabama Supreme Court in relying upon **Walker** uses this language: 'The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire Courts in Cox v. State of New Hampshire (312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049) and Poulos v. State of New Hampshire (345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105), both supra. Cf. Shuttlesworth v. City of Birmingham, 382 U. S. 87, 91, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176; City of Darlington v. Stanley, 239 S. C. 139, 122 S. E. 2d 207. **Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face** (Emphasis supplied) (87 S. Ct. 1830)"; and: "The petitioners in the case of Walker, et al. v. City of Birmingham, 388 U. S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210, decided by the Supreme Court of the United States on June 12, 1967, asserted that they were free to disobey the injunction because Section 1159, on which the injunction was

D.

Section 1159 Is Valid as Construed, Under the "Weighing of Interests" as Well as the "Speech Plus" Doctrine. Both Recognize the Right of Municipalities to Exercise Reasonable Control Over Its Streets, Including Sidewalks, for Safety and Convenience in Their Use as Set Forth in Cox v. New Hampshire.

In a concurring opinion in **Niemotko v. State of Maryland** (1951), 340 U. S. 268, 276, 280, 71 S. Ct. 328, 330, 332, Mr. Justice Frankfurter states the problems: "(H)ow to reconcile the interest in allowing free expression of ideas in public places with protection of the public peace and of the primary uses of streets and parks . . ." In the course of the opinion, many cases are compared or distinguished. He discusses **Lovell v. Griffin**, 303 U. S. 444, 58 S. Ct. 666, and without noticing any conflict with its holding comments on **Cox v. New Hampshire**, 312 U. S. 569, supra, saying:

> "Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, made it clear that the United States Constitution does not deny localities the power to devise a licensing system if the exercise of discretion by the licensing officials is appropriately confined. A statute requiring a permit and license fee for parades had been narrowly construed by the

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based, had been administered in an arbitrary and discriminatory fashion. In support of that contention those petitioners had sought to introduce evidence in the trial court to the effect that a few days before the injunction issued requests for permits to picket had been made to a member of the City Commission and one request had been rudely refused and that this same official had later made it clear that he was without power to grant the permit alone, since the issuance of permits was the responsibility of the entire Commission. The Supreme Court of the United States, in answering that contention, said as follows: 'Assuming the truth of the proffered evidence, it does not follow that the parade ordinance is void on its face.'"

State courts. The license could be refused only for 'considerations of time, place and manner so as to conserve the public convenience', and the license fee was 'to meet the expense incident to the administration of the act and the maintenance of public order in the matter licensed'. 312 U. S. at pages 575-576, 577, 61 S. Ct., at pages 765, 766, 85 L. Ed. 1049. The licensing system was sustained even though the tax, ranging from a nominal amount to $300, was determined by the licensing officials on the facts of each case." **Niemotko v. State of Maryland**, 340 U. S. 280, 71 S. Ct. 332.

The case of **Cox v. State of Louisiana**, 379 U. S. 536, 555, 85 S. Ct. 453, 464, illustrates the principle that marching, picketing or patrolling is more than pure speech: "We emphatically reject the notion urged by Appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

At a later point in his opinion Mr. Justice Goldberg clearly demonstrates that **Cox v. New Hampshire**, 312 U. S. 569, *supra*, squares with the above statement of principle (379 U. S. 558, 85 S. Ct. 466):

> "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" * * * [and with] a "systematic, consistent and just order of

treatment, with reference to the convenience of public use of the highways * * *"'.' Cox v. State of New Hampshire, supra, 312 U. S., at 576, 61 S. Ct., at 766; see Poulos v. State of New Hampshire, supra."

At the very heart of the solution of the problem of safe and orderly use of the streets, including sidewalks, for parades and processions is the requirement of a permit to be issued after proper application:

"The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the Court further observed that in fixing time and place, the license served to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder."

Cox v. New Hampshire, 312 U. S. 576.

In this case, open defiance of Section 1159 and all other laws petitioners and the "Movement" considered unjust, pursuant to which they mounted the April 12, 1963 march accompanied by a thousand or more pseudo-spectators filling the sidewalks and spilling out into the street, resulting in a taking over of the street and precipitating acts of mob violence, differentiates it from the completely peaceful conduct involved in the **Cox v. New Hampshire** case, 312 U. S. 569, *supra*. It also illustrates the very critical danger this Honorable Court warned against in **Cox v. State of Louisiana**, 379 U. S., at page 554, 85 S. Ct. 464:

"The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A re-

striction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."

Mr. Justice Black expressed the same warning in his dissenting opinion in **Cox v. Louisiana**, concerning picketing or marching, especially to or in the vicinity of a court house, when he said (379 U. S. 584, 85 S. Ct. 671):

> "Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow."[7]

It is appropriate to note that the City Hall is a combined City Hall and Court House in which is located the Recorders Courts. Mr. Justice Brennan, in his dissent in **Walker**, says that the march was to the City Hall. 388 U. S. 341, 87 S. Ct. 1842. This brings the instant case directly within the dissenting opinions in **Cox v. Louisiana** (No. 49), banning picketing and parading near a court house. See Opinion of Mr. Justice Black, joined by Mr. Justice White and Mr. Justice Harlan, 379 U. S. 581-585,

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[7] These words of Mr. Justice Black in January 1965 were prophetic of what has happened in 1965 and the years that have followed. The streets of many cities have become battlegrounds. Arson, looting, sniping have mounted every year: In 1965 there were 5 riots; in 1966 20 riots; in 1967 76 riots; during these riots 12 law officers and 118 civilians were killed; civilians injured were 2424; cases of arson 7985; cities where rioters interfered with firemen 66; cities where rioters included snipers 38; estimated property loss $504,200,000. Please see Report on Riots, Civil, Criminal Disorders—Hearings Before the Permanent Sub-Committee Investigations of the Committee on Government Operations, United States Senate, Part I, Charts, at page 14. Riots, looting, arson, sniping, with their toll of property damage, personal injuries and death, continue to mount in 1968 and apparently will far exceed any prior year.

B.

Petitioner Could Not With Impunity Presume at the Time He Participated in the Enjoined March Which Violated Section 1159 That the Supreme Court of Alabama Could Not or Would Not Construe Section 1159 to Require a Narrow, Precise and Non-Discriminatory Exercise of Discretion in the Issuance or Denial of the Permit.

In arguing that he was free to ignore Section 1159 because of its alleged facial unconstitutionality in that it vested an unbridled discretion in the Commission to grant or not to grant a permit, petitioner has relied upon many cases that have no relevance to the point. It must be remembered that Section 1159 is obviously aimed at the regulation of the use of the City streets and ways of the City of Birmingham for the safety and convenience of its citizens. The activities covered by Section 1159 may or may not have as their purpose the communication of ideas or philosophies. But in all cases the orderly use of such streets for the safety and convenience of the public is a legitimate and proper concern of municipal authorities. Such activities all involve "speech plus" and not merely "pure speech".

There can be no doubt that Section 1159 gave petitioner "fair notice" that to participate in a parade without a permit was proscribed, and the construction placed on Section 1159 by the Alabama Supreme Court is as valid as if said ordinance had been amended by the City governing body prior to petitioner's arrest and conviction. The case of **Winters v. New York**, 333 U. S. 507, 68 S. Ct. 665, authoritatively establishes this point. The **Winters** case involved an arrest and conviction of petitioner prior to the State Court's interpretation of its obscenity statute, the basis for the charge against petitioner. The effect of

the State Court's construction of the statute was discussed at 333 U. S., pages 514, 515, 68 S. Ct. 669, 670:

> "The Court of Appeals by this authoritative interpretation made the subsection applicable to publications that, besides meeting the other particulars of the statute, so massed their collection of pictures and stories of bloodshed and lust 'as to become vehicles for inciting violent and depraved crimes against the person'. Thus, the statute forbids the massing of stories of bloodshed and lust in such a way as to incite to crime against the person. **This construction fixes the meaning of the statute for this case. The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature.** Hebert v. State of Louisiana, 272 U. S. 312, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 ALR 1102; Skiriotes v. Florida, 313 U. S. 69, 79, 61 S. Ct. 924, 930, 85 L. Ed. 1193. **We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation.** Compare Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888." (Emphasis supplied.)

The **Winters** case is conclusive to the effect that a State Court can place a limiting construction upon enactments that might be equally susceptible of an overbroad or vague construction, and the statute as so construed becomes the statute in such case. **Winters** also makes it clear that the enactment can be construed after conviction of defendant and in the same case. The **Winters** case, as does respondent herein, recognizes that the enactment as written must give "fair notice" as required by "due process". This, however, is of no great moment in this instance because as noted earlier in II-A, the first paragraph of Section 1159 meets the burden of "fair notice".

Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762, is squarely in point, both as to law and facts, insofar as

85 S. Ct. 470-472; Mr. Justice Clark, 379 U. S. 585-587, 85 S. Ct. 472-473.

In closing Part I, we respectfully contend this Honorable Court's opinion in **Walker**, written by Mr. Justice Stewart, was correct when he said, "Here, just as in Cox and Poulos, it could not be assumed the ordinance was void on its face." In an article appearing in The Supreme Court Review (1967), written by Sheldon Tefft, James Parker Hall, Professor of Law of Chicago University, entitled "Neither Above The Law Nor Below It, A Note On Walker Vs. Birmingham", in which he agrees with the majority opinion, he uses the expression, "The ordinance does not seem to be obviously void." This simply means that 1159, as written, was open to the narrowing interpretation placed upon it by the Alabama Supreme Court appropriately restricting the scope of discretion vested in the City Commission and/so construed is binding upon petitioner and sustains his conviction for its violation.

II.

Petitioner Had Fair Notice as Acquired by Due Process of Law.

A.

Petitioner Had Fair Notice Within the Rules of Lanzetta and Bouie.

Under Section II of petitioner's argument, he contends that his conviction must be reversed because it imposes criminal liability upon him without the fair notice required by due process of law. In support of this contention he cites **Lanzetta v. New Jersey**, 306 U. S. 451, 59 S. Ct. 618; and **Bouie v. City of Columbia**, 378 U. S. 347, 84 S. Ct. 1697.

Lanzetta involved an enactment that made it an offense for anyone who had been convicted three times of being a disorderly person to be a member of any gang "consisting of two or more persons". Since the only purported definition of "gang" was found in that phrase in the statute reading: "consisting of two or more persons", this Court correctly held that defendant had not received fair notice.

The rule found in **Lanzetta v. New Jersey**, 306 U. S., at page 453, 59 S. Ct., at page 619, is discussed as follows:

> "The applicable rule is stated in Connally v. General Const. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The enactment in **Bouie** proscribed going upon the lands of another after notice not to do so. The enactment provided for notice by posting a notice "in four conspicuous places on the borders of such land prohibiting entry thereon. . . ."

It is obvious under this enactment that the warning must precede the trespass. The facts, however, upon which petitioners were convicted did not reveal any advance warning, and it was only after construction by the Supreme Court of South Carolina that anyone had notice that a conviction could be had on notice given subsequent to the entry.

The facts in **Bouie** reveal that Negroes, as invitees, entered a drug store in Columbia, South Carolina. They were invited to all departments in the store except the restaurant portion. On this occasion the petitioners sat in a booth in the restaurant area, and were subsequently told to leave. Upon their refusal they were arrested and convicted under the trespass statute referred to above.

This Honorable Court, after pointing out that the South Carolina statute could be distinguished from the gangster statute in **Lanzetta** because the trespass enactment was not vague and uncertain but "was admirably narrow and precise", nevertheless held it did not meet the fair notice requirement of due process. In this regard, this Court said, in **Bouie v. City of Columbia**, 378 U. S., at page 352; 84 S. Ct., at pages 1701, 1702:

> "The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to the coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes', as in Lanzetta, or to 'guess at [the statute's] mean-

ing and differ as to its application', as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

It is readily apparent that Section 1159 does no violence to the fair notice requirement of due process. The first paragraph of Section 1159 is the proscribing part and certainly affords fair notice that participating in a parade without a permit is proscribed. This paragraph reads:

"Sec. 1159. Parading.

"It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the Commission."

Section 1159 is not vague so as to require speculation as to its meaning, as in **Lanzetta**, and it is not necessary to " 'guess at [its] meaning and differ as to its application', as in Connally". The construction the Alabama Supreme Court placed on Section 1159 in no way changed the first paragraph of that section. The limiting effect of that Court's construction related solely to the administrative procedures required by Section 1159. There was no effort to enlarge the scope of the proscription of 1159 by the Alabama Supreme Court. The first paragraph, which actually sets out the offense and gives notice of the proscription involved, remained the same before and after construction. Thus, it is clear that Section 1159 does afford the fair notice required by the due process clause of the Constitution. It certainly complies with the rule announced by **Lanzetta** and **Bouie**.

establishing the right of the Alabama Supreme Court to construe Section 1159 following petitioner's arrest and conviction. In fact, the New Hampshire statute which regulated parading, did not even purport to establish standards for the issuance or denial of the permit prior to its construction by the State court. Nevertheless, this Court in a unanimous opinion upheld the validity of the New Hampshire statute as construed.

In **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, involving an appeal from a contempt of court conviction for parading in violation of Section 1159, this Honorable Court specifically noted that Section 1159 could be subjected to a narrowing construction, and in effect invited such construction by the State Court. This Court in **Walker** pointed out that the State "courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State of New Hampshire and Poulos v. State of New Hampshire, . . ."

In **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211, this Court reaffirmed the principle of **Winters** and **Cox. Shuttlesworth** involved the validity of an ordinance which was construed by the State court to save it from attack as unconstitutional.[8] This construction came after conviction of the defendant.

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[8] This is made clear in Mr. Justice Brennan's concurring opinion, 382 U. S., at page 99: "I join the Court's opinion on my understanding that Middlebrooks v. City of Birmingham is being read as holding that Section 1142 applies only when a person: (a) stands, loiters or walks on a street or sidewalk so as to obstruct free passage, (b) is requested by an officer to move on, and (c) thereafter continues to block passage by loitering or standing on the street. **It is only this limiting construction which saves the statute from the constitutional challenge that it is overly broad.** Moreover, because this construction delimits the statute to 'the sort of "hard-core" conduct that would obviously be prohibited under any construction', Dombrowski v. Pfister, 380 U. S. 479, 491-492, 85 S. Ct. 1116, 1124, 14 L. Ed. 2d 22, **it may be legitimately applied to such conduct occurring before that construction**" (Emphasis added).

C.

Cases Relied Upon by Petitioner Cited in Part I and Referred to in Part II of His Brief Are Not in Point. These Cases Did Not Teach Petitioner That He Could Ignore Section 1159.

These cases, so petitioner argues, have the effect of teaching him that he could ignore the permit requirement of such ordinance and therefore he has been denied due process in that he did not have "fair notice" at the time he defied the state court injunction which enjoined him from participating in a mass parade or procession without applying for a permit as required by Section 1159. We shall undertake to show that these cases are not applicable and shall deal with them as groups or individually.

The cases erroneously relied upon by petitioner are divided into groups as follows: (a) "The Movie Censorship Cases", (b) Distribution of Literature and Solicitation Cases, (c) Public Assembly Cases, and (d) The Remaining Cases.

(a)

The Movie Censorship Cases.

Petitioner cites the following cases, all involving the validity of enactments creating movie review boards to censor movies prior to their presentation to the public. **Interstate Circuit, Inc. v. City of Dallas**, 20 L. Ed. 2d 225; **Joseph Burstyn, Inc. v. Wilson**, 343 U. S. 495, 72 S. Ct. 777; **Gelling v. Texas**, 343 U. S. 960, 72 S. Ct. 1002; **Superior Films, Inc. v. Department of Education**, 346 U. S. 587, 74 S. Ct. 286; **Commercial Pictures Corp. v. Regents**, 346 U. S. 587, 74 S. Ct. 286; **Holmby Production, Inc. v. Vaughn**, 350 U. S. 870, 76 S. Ct. 117; **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734.

The movie censorship cases all involve the regulation of pure speech and as such are subject to a very limited amount of regulation by the state. In fact, Mr. Justice Black and Mr. Justice Douglas are of the opinion that all censorship of movies violates the First Amendment and they "would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment". **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734; and **Interstate Circuit, Inc. v. Dallas**, 20 L. Ed. 2d 225. In contrast, Mr. Justice Black would not afford First Amendment protection to those who parade on the streets. In **Amalgamated Food Emp. U. Local 590 v. Logan Valley Plaza**, 88 S. Ct. 1601, he said: "And of course picketing, that is patrolling, is not free speech and not protected as such." See also **Cox v. Louisiana**, 379 U. S., at page 578.

The movie censorship cases all involve enactments directed to the regulation of pure speech. Section 1159 regulates speech only incidentally to its regulation of traffic. The act of parading involves elements of both speech and conduct, i. e., patrolling or marching, and can be subjected to controls that would not be constitutionally permissible in the case of pure speech. **Amalgamated Food Emp. U. Local 590 v. Logan Valley Plaza**, 88 S. Ct. 1601 (1968).

It should also be noted that insofar as these cases are concerned, they could not teach petitioner that he could presume Section 1159 was unconstitutional prior to its construction by the Alabama Supreme Court. This Honorable Court, in **Interstate Circuit, Inc. v. City of Dallas**, 20 L. Ed. 2d 225, at least inferentially recognized the right of the state courts to construe such censorship enactments after the act of censoring. This follows from this Court's apparent recognition that the State Court could have narrowly defined the ordinances dealt with in **Interstate**. "Nor did the Court of Civil Appeals pro-

vide much enlightenment or a narrowing definition of the ordinances."

Thus, the State Courts are even permitted to construe enactments creating censorship boards, which are the most flagrant prior restraints of speech, and such construction will prevail in this Court. Certainly, a State Court's limiting construction of an ordinance regulating the use of the streets for the benefit, safety and convenience of the public ought to be anticipated by one who violates its plain proscription, as did petitioner herein.

(b)

Distribution of Literature and Solicitation Cases.

Petitioner cites the following cases, all either involving the validity of enactments regulating the distribution of handbills and pamphlets, or the solicitation of funds or members for various causes.

Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666; **Schneider v. New Jersey**, 308 U. S. 147, 60 S. Ct. 146; **Largent v. Texas**, 318 U. S. 418, 63 S. Ct. 667; **Jones v. Opelika**, 316 U. S. 584, 62 S. Ct. 1231, vacated by 319 U. S. 103, 63 S. Ct. 890; **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277; **Cantwell v. Connecticut**, 310 U. S. 296, 60 S. Ct. 900; **Hague v. C. I. O.**, 307 U. S. 496, 59 S. Ct. 954; **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274.

The foregoing cases, like the movie censorship cases, also involve pure speech, and as such may not be regulated as would be permissible in cases wherein the speech is intermingled with conduct. **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (1968).

In **Lovell v. Griffin**, 303 U. S. 444, 58 S. Ct. 666, an attempt was apparently made to inject conduct into the act

of passing out literature on the theory that the enactment regulated only the distribution and not the publication. This theory was rejected by this Court:

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value!"

Shortly after **Lovell v. Griffin**, *supra*, was decided, this Court decided the case which respondent conceives to be identical to the instant case, i. e., **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762. In **Cox v. New Hampshire**, *supra*, this Honorable Court upheld the validity of an enactment, virtually the same as Section 1159, except the statute in **Cox** was completely without any standards governing the discretion of the administrative officer charged with issuance of permits until the New Hampshire Supreme Court narrowly limited such discretion in the same case for which petitioner there was arrested. This Honorable Court sustained the convictions of petitioner Cox, and upheld the statute as construed by the New Hampshire Court. This Court, in its **Cox v. New Hampshire** decision, cited **Lovell v. Griffin**, *supra*; **Schneider v. State**, 308 U. S. 147, 60 S. Ct. 146; **Hague v. C. I. O.**, 307 U. S. 496, 59 S. Ct. 954; and **Cantwell v. Connecticut**, 310 U. S. 296, 60 S. Ct. 900. Since this Court approvingly cited **Lovell**, **Hague**, **Schneider** and **Cantwell** in **Cox v. New Hampshire**, *supra*, the only conclusion that can be drawn is that the Court found those cases not to be in conflict with the holding in **Cox**.

The only cases set out under "(b)" above that were not considered in **Cox v. New Hampshire**, *supra*, are **Largent v. Texas**, 318 U. S. 418, 63 S. Ct. 667; **Jones v. Opelika**, 316 U. S. 584, 62 S. Ct. 1231, vacated by 319 U. S. 103, 63 S. Ct. 890; and **Staub v. City of Baxley**, 355 U. S. 313, 78

S. Ct. 277, all of which stand for the **Lovell v. Griffin** principle, which was found to be not in conflict with **Cox**, and all of which were decided after **Cox**; and also two other cases, **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274, which were also decided after **Cox** but involved completely different principles. These two cases will be dealt with later at page 49.

Cox v. New Hampshire, *supra*, did not involve pure speech, and as the statute was construed it did not vest an unbridled discretion in state authorities to either issue or deny the parade permit.

It should be noted that except for **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274; all of the cases listed under "(b)" above, as well as **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 312, and **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325, listed under "(c)" below, were cited in **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277, because the enactments as construed by the State courts left the exercise of First Amendment rights in the unbridled discretion of the official charged with granting the permit. It should also be noted that the enactments involved in those cases did not regulate conduct such as marching or picketing. It therefore clearly appears that unbridled discretion in "pure speech" or "freedom of association" situations is the critical point of **Staub v. Baxley**, 355 U. S. 313. That case, at U. S., page 322, cites the cases referred to above as involving the same constitutional question:

> "In Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, this Court held invalid an act which proscribed soliciting money or any valuable thing for 'any alleged religious, charitable or philanthropic cause', Gen. St. 1930, Sec. 6294, un-

less the 'cause is approved by the secretary of the public welfare council of the state'. Speaking for a unanimous Court, Mr. Justice Roberts said: 'It will be noted, however, that the act requires an application to the secretary of the public welfare council of the state; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion . . . is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

"'[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.' 310 U. S., at pages 305, 307, 60 S. Ct. at page 904. To the same effect are Lovell v. City of Griffin, supra, 303 U. S. at pages 451, 452, 58 S. Ct. at pages 668, 669; Hague v. C. I. O., 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; Schneider v. State of New Jersey, Town of Irvington, 308 U. S. 147, 163, 164, 60 S. Ct. 146, 151, 152, 84 L. Ed. 155; Largent v. State of Texas, 318 U. S. 418, 422, 63 S. Ct. 667, 669, 87 L. Ed. 873; Jones v. City of Opelika, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290, adopting *per curiam* on rehearing the dissenting opinion in 315 U. S. 584, 600-602, 62 S. Ct. 1231, 1240, 1241, 86 L. Ed. 1691; Niemotko v. State of

Maryland, 340 U. S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267; Kunz v. People of State of New York, 340 U. S. 290, 293, 71 S. Ct. 312, 314, 95 L. Ed. 280."

It should also be noted that in each of such cases cited in **Staub** the particular ordinance or statute was reviewed in the United States Supreme Court and held invalid after construction in the respective state courts. These cases may be further distinguished from the instant case. Here, Section 1159 as construed by the Alabama Supreme Court is unquestionably valid. It does not involve "pure speach" or "freedom of association" but is confined to safety and convenience in the use of the streets and ways of the City. This latter distinction is made clear in **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453, at U. S. pages 553, 554, S. Ct. page 464, wherein Mr. Justice Goldberg said:

> "Appellant, however, contends that as so construed and applied in this case, the statute is an unconstitutional infringement on freedom of speech and assembly. This contention on the facts here presented raises an issue with which this Court has dealt in many decisions, that is, the right of a state or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly. See Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; Largent v. State of Texas, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Kovacs v. Cooper,

336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513; Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325, 328, 95 L. Ed. 267, 280; Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280; Poulos v. State of New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105.

"From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection . . ."

The remaining two cases under "(b)" are **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274.

Each of these cases involved the arrest and conviction of members of the sect known as "Jehovah's Witnesses" for the dissemination of their views in a private company owned town and a Federal housing project respectively, in violation of their First Amendment freedoms. The charge in effect in each case was "Trespass After Warning".

The focal point in issue in each case was the authority or right of the person in charge of the properties to exclude those whom they did not want from such property

to the complete loss of their freedom of speech and religion.

Nothing in either of these cases teaches petitioner herein that he could ignore ordinances regulating the use of the streets for the safety and convenience of all the citizens.

(c)

Public Assembly Cases.

The following cases all involve the regulation of public assemblies. The enactments involved are different and have different purposes, but each in its own way was applied to regulate a public assembly.

Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148; **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 312; **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325.

Petitioners in the three cases above were convicted for holding public assemblies. The thrust of the proscription in each case is different but all vested an unbridled discretion in the state to grant or deny the right of "public assembly". These cases are such that the justification for the state's regulation was outweighed by the interest represented by the First Amendment liberty involved.

Saia v. People of State of New York, *supra*, involved an enactment that proscribed the use of radios, loudspeakers, etc., in such a manner that other people were annoyed. Section 3 of the enactment reads as follows:

> "Section 3. Exception.—Public dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities, shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

Petitioner in **Saia** was a Jehovah's Witness minister who lectured over a loudspeaker in a city park on Sundays. When the permit for such activity expired, he made application for a new permit. His application was denied because of alleged annoyance to certain people in the vicinity of the park. Petitioner then conducted lectures without benefit of the permit and was arrested and convicted.

This Court held that after construction by the state court Section 3 of the act vested an unbridled discretion in the Chief of Police to either grant or deny permission to use the park for public assembly.

To demonstrate the firm entrenchment of the rules relating to the regulation of pure speech, we quote from Mr. Justice Douglas, speaking for the Court at 334 U. S., page 561, 68 S. Ct., page 1150:

> ". . . Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case, and freedom of speech and assembly in the Hague case."

Following this statement the Court in **Saia**, 334 U. S. 558, 68 S. Ct. 1148, in a footnote at U. S. Page 561, Mr. Justice Douglas speaking for the Court, recognized that **New Hampshire Cox** is not inconsistent with these rules, but is merely an application of the same rules to a properly construed enactment regulating the use of the streets. The footnote is number 2 and reads:

> "Cox v. New Hampshire, 312 U. S. 569, 577, 578, 61 S. Ct. 762, 763, 85 L. Ed. 1049, 133 ALR 1396, did not depart from the rule of these earlier cases but reemphasized the vice of the type of ordinance we have here. Davis v. Massachusetts, 167 U. S. 43, 17 S. Ct. 731, 42 L. Ed. 71, was distinguished in the Hague

case, 307 U. S. pages 514-516, 59 S. Ct. pages 963, 964, 84 L. Ed. 1423, which likewise involved an ordinance regulating the use of public streets and parks. It was there said, 'We have no occasion to determine whether, on the facts disclosed, the Davis case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied'.

"We adhere to that view. Though the statement was that of only three Justices, it plainly indicated the route the majority followed, who on the merits did not consider the Davis case to be controlling."

The case of **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 312, involved an ordinance that proscribed public worship meetings on the streets without first obtaining a permit from the city police commissioner.

The facts reveal that petitioner, an ordained Baptist minister, obtained the required permit for the year of 1946. This permit was revoked in November 1946 because "he had ridiculed and denounced other religious beliefs in his meetings". Petitioner continued to speak without the permit until his arrest in September 1948.

The only issue before the Court was the speech activity of 1948. The defendant was not charged for any prior years. This Court held the ordinance vested an unbridled discretion in the police commissioner to either grant or deny the permit:

> "Disapproval of the 1948 permit application by the police commissioner was justified by the New York courts on the ground that a permit had previously been revoked 'for good reason'. It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. This interpretation allows the police commissioner, an administrative official, to exercise discretion in denying subsequent permit applications on the basis of his interpretation, at that time of what is deemed to be conduct condemned by the ordinance. We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights."

After determining that the enactment was void as a prior restraint on the exercise of First Amendment freedoms, the Court specifically pointed out that First Amendment liberties could nevertheless be regulated to prevent serious interference with normal usage of streets and parks:

> "**Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks,** Cox v. State of New Hampshire, 1941, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon **broad criteria unrelated to proper regulation of public places.**" (Emphasis ours.)

Petitioners in **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325, were Jehovah's Witnesses who conducted religious services in a public park and were convicted for disorderly conduct. These petitioners were denied permits on several occasions, but on the third Sunday following denials of permits for the preceding Sundays, petitioners conducted the meetings without benefit of permit. In this case there was no statutory authority requiring a permit, but a custom existed whereby the Park Commissioner issued such permits. The arrest and convictions was for disorderly conduct based upon the absence of a permit. The conviction was overturned because the inevitable result was to place an absolute prohibition upon pure speech in the particular situation. It did not involve regulation of picketing or parading on the streets or public ways and has no application to this case. In fact, it notes and distinguishes **New Hampshire Cox**, as we have previously noted at page 31 of this brief.

(d)

The Remaining Cases.

The only remaining cases cited by petitioner in support of his theory that Section 1159 is facially void and therefore he could ignore the permit requirement are **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211. **Cox v. Louisiana**, *supra*, has been dealt with at length in this brief at pages 33-35 and will not be discussed further at this point.

Shuttlesworth did not involve speech, either mixed or pure. It was a "due process" case relating to "fair trial". It turned on the question of whether the trial court based it decision on the subsequent construction of Section 1142 or as that section read prior to construction. The ordinance as written was in the alternative and proscribed

blocking the sidewalk and also failing to move on after a request by a police officer. The complaint filed by the city also charged the offense in the alternative. After petitioner's conviction the Appellate Court, in a different case, construed that section to require proof of both blocking the sidewalk and refusal to obey the lawful command of an officer. This Court accepted that construction to validate the ordinance but concluded that it was possible that the trial judge may have convicted solely on evidence relating to blocking the sidewalk and not on evidence that petitioner refused to obey the officer; or to the contrary he may have convicted because the defendant refused to obey the officer and at the same time have found the evidence did not establish that the defendant blocked the sidewalk. This Court reached this conclusion because the trial court, at the time of the trial, did not have benefit of the Court's construction. Thus, it is clear that this case has no relevance to the instant case.

D.

Raley v. Ohio, 360 U. S. 423, 79 S. Ct. 1257; Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731; Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772; O'Connor v. Ohio, 385 U. S. 92, 87 S. Ct. 252; and James v. United States, 366 U. S. 213, 81 S. Ct. 1052, Have No Relevance to the Instant Case.

The cases set out above are completely without relevance insofar as the instant case is concerned. **Linkletter, Johnson** and **O'Connor** simply held that cases such as **Mapp v. Ohio**, 367 U. S. 643; **Escobedo v. Illinois**, 378 U. S. 478; **Miranda v. Arizona**, 384 U. S. 436; and **Griffin v. California**, 380 U. S. 609, which cases established new rules of criminal procedure and overturned prior procedures legally relied upon by public officials until these cases were decided, would not be given retroactive effect.

The facts in **Raley v. Ohio**, 360 U. S. 423, established that the Ohio Un-American Activities Commission misled petitioners into the belief that said petitioners did not have to testify before said Commission, but could rely on their constitutional right against self-incrimination. Petitioners took the Commission at its word and refused to testify. They were subsequently cited for contempt by said Commission and convicted because Ohio by statute granted immunity to persons testifying before said Commission.

This is entrapment in its classic form, and of no relevance to the issues involved here. Petitioner wasn't told, and had no reason to believe that he could parade without the permit. In fact, **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, taught him he must secure said permit.

In **James v. United States**, 366 U. S. 213, petitioner was convicted of willfully attempting to evade federal income taxes. The taxes he attempted to evade were those alleged to be owed on funds embezzled that year. A prior decision of this Honorable Court had held that embezzled funds are not to be included in the taxable income of the embezzler in the year in which they are misappropriated. **James** overruled this decision, thereby making such embezzled funds taxable, but reversed petitioner's conviction.

This case is not in point because **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, decided over a quarter of a century ago by a unanimous court, and many times by this Honorable Court approved in a line of cases, the most recent one being **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (May 20, 1968), continues to stand for the proposition that persons who desire to parade or march along city streets may properly be required to secure a permit in order that municipal authorities be able to limit the amount of interference with use of the sidewalks by other members of the public

by regulating the time, place and manner of the parade or march. In no event can petitioner complain he was not fully advised by this Honorable Court by the teaching of **Cox** and the many cases reaffirming it of the consequences of his illegal conduct in this case.

E.

Petitioner Had Fair Notice That His March in Formation Along the Sidewalk Was a Parade or Procession Within the Proscription of Section 1159.

Petitioner also contends that Section 1159 fails to give "fair notice" because although clear on its face that parades were proscribed, petitioner could not be expected to know that his march down the sidewalk would be treated as such. He contends that he could not know either that his march was of a type proscribed or that such march taking place on the sidewalk was proscribed. These contentions, however, ignore the teaching of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, which should have taught petitioner that a march such as his was within the proscription of Section 1159, even though it took place on the sidewalk. **Cox v. New Hampshire**, *supra*, involved a sidewalk march involving a smaller group than in this case. In **Cox v. New Hampshire**, *supra*, a unanimous Court said:

> "There appears to be no ground for challenging the ruling of the state court that Appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: 'It was a march in formation, and its advertising and informatory purpose did not make it otherwise. . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in ordered and close file as a collective body of persons on the city streets'."

Cox v. New Hampshire, *supra*, representing for over twenty-five years the law in this field, should have been sufficient notice to petitioner that his conduct was proscribed. However, in this instance there was direct evidence that petitioner was on notice and knew his conduct was in violation of Section 1159. Mr. Justice Stewart, in **Walker v. City of Birmingham**, 388 U. S. 307, 310, 87 S. Ct. 1824, makes this clear when he discussed a press release issued by four of the petitioners in **Walker**, including, we interpolate, Rev. F. L. Shuttlesworth, in which they announced their decision to march in spite of an injunction forbidding parading without a permit as required by this ordinance (388 U. S., at page 310).

> "That night a meeting took place at which one of petitioners announced that 'injuction or no injunction we are going to march tomorrow'. The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by 'clapping and hollering and (w)hooping'. Some of the crowd followed the marchers and spilled out into the street . . ."

In fact, one of the chief issues involved in **Walker** was whether petitioners, including the Rev. F. L. Shuttlesworth, violated an injunction restraining petitioners, including Rev. Shuttlesworth, from participating in or encouraging mass street parades or processions without a permit as required by Section 1159, when they participated in the same parade for which petitioner was arrested in the instant case. This Court, in **Walker**, concluded that petitioners had violated the injunction by this march without a permit, and upheld petitioner's conviction for contempt.

In addition to **Cox v. New Hampshire**, *supra*, respondent finds that the General City Code of Birmingham of 1944

also teaches petitioner that a march down the sidewalk is a march within the street. "Sidewalk" is defined in Section 2 of the General City Code of Birmingham of 1944:

> "Sec. 2. Definitions and rules of construction.
>
> In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise. . . .
>
> Sidewalk. The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

III.

It Is Not Necessary That Section 1159, as Construed Provide for a Prompt Administrative Proceeding and Judicial Review If the Permit Required by Section 1159 Is Denied. A "Motion to Dissolve" the Injunction Pending at the Time of Petitioner's Parade Without a Permit or "Mandamus" to Compel the Issuance of Said Permit Are Adequate.

A.

Only Enactments That Censor the Content of Speech Must Provide for Both a Prompt Administrative Proceeding and Judicial Review.

Petitioner argues that Section 1159, as construed by the Alabama Supreme Court, is unconstitutional because it does not contain procedural safeguards designed to obivate the dangers of a censorship system. He contends that the porcedural safeguards to be adequate must provide for both a prompt administrative proceeding and a prompt judicial review if such permit is denied. In support of this argument, petitioner relies upon **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734; **Teitel Film Corp. v. Cusack**, 390 U. S. 139, 88 S. Ct. 754; and **Bantam Books, Inc. v. Sullivan**, 372 U. S. 58, 83 S. Ct. 631.

The rule announced in **Freedman, Teitel** and **Bantam** applies only to censorship and not to enactments regulating the use of the streets. Insofar as we can determine from exhaustive research, this rule has only had application when the content of speech, i. e., the content of books and movies, is subjected to censorship prior to its dissemination or showing. This rule obtains where the vice of a statute is that it delegates "excessive discretion" upon a censorship board. In **Freedman v. Maryland**, 380 U. S., at pages 56 and 57, Mr. Justice Brennan speaking for the Court said:

> "Although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute, we think that appellant's assertion of a similar danger in the Maryland apparatus of **censorship**—one always fraught with danger and viewed with suspicion—gives him standing to make that challenge. In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the **censor's** action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion" (Emphasis added).

Respondent does not disagree with the above conclusion that the vice of statutory delegation of excessive administrative discretion and the vice of censorship without prompt administrative and judicial review are similar. Respondent does argue, however, that Section 1159 is not infected with either vice. The Supreme Court of Alabama in the instant case correctly pointed out at 206 So. 2d, page 350, that under the provisions of Section 1159 "[t]he members of the Commission may not act as censors of what is to be said or displayed in any parade". It is thus clear that **this enactment is not cen-**

sorship. Nor is Section 159 infected with the vice of conferring excessive administrative discretion upon the City Commission. The administrative discretion conferred upon the Commission was limited to the same extent as was the discretion to grant or deny parade permits conferred by the statute in **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, which this Court held did not confer excessive discretion. This point is dealt with in greater detail in Part I of Respondent's brief. In contrast, this Court in **Cox v. New Hampshire**, 312 U. S. 569, *supra*, recognized that cases such as **Lovell v. Griffin**, 303 U. S. 444; and **Schneider v. New Jersey**, 308 U. S. 147, involved enactments that did confer excessive discretion in free speech situations, and therefore were not relevant. In neither cases such as **Lovell v. Griffin**, *supra*, and **Schneider v. New Jersey**, *supra*, wherein the enactments involved did confer excessive discretion to deny speech, nor in cases such as **Cox v. New Hampshire**, *supra*, and the instant case, wherein the statutes did not confer excessive discretion in this regard, has this Honorable Court required that statutory provisions afford both a prompt administrative and judicial review. These procedures are only required when the enactments involved purport to control or censor what may be said.

There can be no doubt that enactments, such as Section 1159, focused on the safe and convenient use of the streets and sidewalks, deal with conduct that may or may not be intermingled with speech, and are not subject to the same restrictions as enactments that regulate pure speech. **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (1968); **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453. Enactments such as Section 1159 which regulate "speech plus" have never been construed by this Court to require the same procedural safeguards as statutes which censor the content of pure speech. Cases such as **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734;

Teitel Film Corp. v. Cusack, 390 U. S. 139, 88 S. Ct. 754; and **Bantam Books, Inc. v. Sullivan**, 372 U. S. 58, 83 S. Ct. 631, all involve enactments aimed at the censorship or control of the content of speech. Section 1159 is an enactment designed to regulate parades on the streets, but when such parades manifest elements of speech, it is speech intermingled with conduct. However, the permit required cannot be used to censor what may be said or displayed in any parade. **Shuttlesworth v. Birmingham**, 206 So. 2d, at page 350, makes it clear that "the Commission may not act as censors of what is to be said or displayed in any parade".

It is equally obvious that this Honorable Court considered the procedures we discuss herein to only have application to censorship systems. This is made clear in **Freedman v. Maryland**, 380 U. S., at pages 57, 58, 85 S. Ct., at page 738, when the Court observed that it was there dealing with a censorship system:

> ". . . The administration of a **censorship system** for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a **censorship proceeding** puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interest in free expression. And if it is made unduly onerous by reason of delay or otherwise to seek judicial review, the **censor's** determination may in practice be final.
>
> "[7-13] Applying the settled rule of our cases, we hold that **a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.**" (Emphasis supplied.)

The reasons behind the requirement that enactments creating censorship systems must provide both a prompt administrative proceeding and a prompt judicial review do not exist where a narrowly drawn enactment confers a properly limited administrative discretion on one charged with issuing a parade permit. The question of what can be said and what cannot be said is by its very nature a subject that should be judicially determined. The same considerations obviously do not enter into the issuance or denial of a permit to parade upon the streets. Only traffic conditions and safety and convenience of the public in the use of the streets, including sidewalks, are to be considered in determining whether to issue or deny the permit, and then if a denial is justified such justification only exists until the conditions change and then the permit must issue. Censorship systems clearly call for a judicial review, but enactments such as 1159 call only for an adminstrative determination within very narrowly circumscribed limits. For convenience, we have set forth Section 1159 as originally written and as construed by the Alabama Supreme Court in the Appendix hereto, at pages 70 and 71, respectively.

B.

Mandamus and in This Case a Motion to Dissolve the Injunction Provide Adequate Procedures for the Review of Denials of Permits Required by Section 1159.

Petitioner also argues that the procedures afforded by law to review the denial of his application for a parade permit are not adequate. Even in the absence of petitioner's pending action, i. e., the Ex parte injunction which permitted a ready review of any denial of a parade permit by motion to dissolve such injunction, he had an adequate method of review. The case of **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760, stands as posi-

tive authority that the normal procedures provided by state law are sufficient.

Petitioner in **Poulos** made application for a permit to hold a religious meeting in a public park as required by statute. His application was denied and he was subsequently convicted for holding such meeting without a permit. The Supreme Court of New Hampshire determined that the permit had been arbitrarily and unlawfully denied, but nevertheless upheld petitioner's conviction because petitioner chose to violate a proper and narrowly construed enactment rather than pursue his legal remedy to compel issuance of the license. This Court upheld petitioner's conviction and agreed that his only lawful recourse was to compel the issuance of this license. In this regard, this Honorable Court, at 345 U. S., pages 408, 409, 73 S. Ct., at pages 768, 769, said:

> "Second. New Hampshire's determination that the ordinance is valid and that the Council could be compelled to issue the requested license on demand brings us face to face with another constitutional problem. May this man be convicted for holding a religious meeting without a license when the permit required by a valid enactment—the ordinance in this case—has been wrongly refused by the municipality?
>
> "Appellant's contention is that since the Constitution guarantees the free exercise of religion, the Council's unlawful refusal to issue the license is a complete defense to this prosecution. His argument asserts that if he can be punished for violation of the valid ordinance because he exercised his right of free speech, after the wrongful refusal of the license, the protection of the Constitution is illusory. He objects that by the Council's refusal of a license, his right to preach may be postponed until a case, possibly after years, reaches this Court for final adjudication of constitutional rights. Poulos takes the position

that he may risk speaking without a license and defeat prosecution by showing the license was arbitrarily withheld.

"[8-10] It must be admitted that judicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. But to allow applicants to proceed without the required permits to run businesses, erect structures, purchase firearms, transport or store explosives or inflammatory products, hold public meetings without prior safety arrangements or take other unauthorized action is apt to cause breaches of the peace or create public dangers. The valid requirements of license are for the good of the applicants and the public. It would be unreal to say that such official failures to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution. Delay is unfortunate but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning. Nor can we say that a state's requirement that redress must be sought through appropriate judicial procedure violates due process."

Respondent can find nothing in either petitioner's brief or the cases cited therein that even tends to be persuasive that Section 1159 is not facially valid. In fact, **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, all discussed in relation to this issue in Part I of this brief, conclusively establish the facial validity of Section 1159. It necessarily follows that petitioner's argument that the lawful procedures to compel issuance of the permit were inadequate is without merit. In this regard, it should be noted that petitioner here did not even make application

for a parade permit, **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, whereas in **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760, petitioner applied for such permit and the Council unlawfully denied such permit. This indeed would be a valid basis for distinction even if petitioner in **Poulos** had succeeded under his theory that the unlawful refusal to issue the permit justified his defiant violation of the ordinance. In the absence of facts showing the petitioner here made application for a permit, the presumption is that the Commission would have granted the permits. The rule in this regard has been stated in **Black v. Wilson**, 281 Ala. 6, 198 So. 2d 286:

> "A reversal of the judgment of the trial court would have the effect of bringing about a court order commanding the respondents below to do that which the Legislature has said they should do. The presumption prevails that public officials charged with a duty will perform that duty."

Petitioner in the instant case had not only a court but a pending case in which to contest the validity of Section 1159. On Good Friday, April 12, 1963, when petitioner elected to violate Section 1159 by participating in a mass parade without the required permit, he was acting in defiance of an injunction that enjoined him from mass parading without said permit. The State Court and the injunction suit were available to petitioner had he chosen to contest the validity of Section 1159 by filing a motion to modify or dissolve the injunction. This point was not overlooked by this Honorable Court when it considered this petitioner's contempt conviction for violating that injunction in the case of **Walker v. City of Birmingham**, 388 U. S. 307, pages 318, 319, 87 S. Ct. 124, at page 1831:

> "This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration

of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. The injunction had issued *ex parte*; **if the court had been presented with the petitioner's contentions, it might well have dissolved or at least modified its order in some respects. If it had not done so, Alabama procedure would have provided for an expedited process of appellate review.** It cannot be presumed that the Alabama Courts would have ignored the petitioners' constitutional claims" (Emphasis supplied).

The expedited process of appellate review referred to above is Alabama Supreme Court Rule 47, Title 7, Appendix, Code of Alabama 1940, Recompiled 1958. Rule 47 reads:

"In all Appeals Involving Extraordinary or Remedial Writs. In all appeals involving extraordinary or remedial writs, these rules shall apply unless the court orders otherwise. In appeals from judgments or decrees rendered in habeas corpus, injunction, certiorari, supersedeas, quo warranto, mandamus, prohibition, and appointing or refusing to appoint a receiver proceeding, the appellant within five days after the appeal has been taken, or the appellee within five days after service of the notice of appeal may petition this court to reduce the time for the filing of briefs in the cause and to specify an earlier date for submission of the appeal. Adversary counsel shall be given three days' notice of the date and time of the proposed presentation of the petition to the court. Upon presentation of the petition, the court may prescribe time limita-

tions for the filing of briefs and for submission which are less than otherwise prescribed by the rules, if the court is of the opinion that the normal time allowed by these rules for filing of briefs and submission of the appeal would work injustice, or the appeal involves a question of great public interest affecting the public good and requires an earlier filing of briefs and submission of the appeal. When the court is not in session, such petition may be presented to and acted upon by the senior accessible member of the court. The provision of this rule providing for the earlier filing of briefs and earlier submission of a cause shall not apply in any case where the appellant, because of uncertainty as to his remedy, seeks relief by mandamus as an alternative to his appeal, nor to appeals in cases where the injunctive relief involved was merely incidental to other relief sought."

Even if we presume petitioner had applied for the parade permit, as required by Section 1159, and been refused, a presumption that we do not think is valid, **Black v. Wilson**, 281 Ala. 6, 198 So. 2d 286, and had then sought to compel its issuance by "mandamus", Rule 47 provides the same expedited process for appellate review as in cases involving injunctions. Its provisions apply to "mandamus" proceedings as well as to injunctions.

There can be no doubt that the Alabama Courts are on notice that a petitioner's action, whether a "motion to dissolve" an injunction or "mandamus" to compel issuance of a permit, as required by Section 1159, must be handled expeditiously. This is the obvious import of this Honorable Court's statement[9] in **Walker v. City of Birmingham**, 388 U. S. 307, at pages 318, 319, that:

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[9] The Supreme Court of Alabama approved this statement in relying upon **Walker** in its **Shuttlesworth** opinion and decision. Therefore, the circuit courts of Alabama are put on notice of its requirements and their duty to comply therewith.

"This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustrations of their constitutional claims."

Alabama Circuit Courts will comply with this mandate but should a Circuit Court in Alabama fail in this regard, then certainly expeditious relief can be had through the Alabama Supreme Court by calling its supervisory powers over circuit courts into action. These supervisory powers are conferred upon it in the Alabama Constitution of 1901, Article 6, Section 140:

"Sec. 140. Except in cases otherwise directed in this Constitution, the supreme court shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law, except where jurisdiction over appeals is vested in some inferior court, and made final therein; **provided, that the supreme court shall have power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions.**" (Emphasis supplied.)

CONCLUSION.

It is respectfully requested that the judgment of the Alabama Supreme Court be affirmed.

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APPENDIX.

"Sec. 1159. Parading.

It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such paarde, procession or other public demonstration. The commission shall grant a written permit for such paarde, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral procession."

Section 1159 as construed by the Alabama Supreme Court in 206 So. 2d 348, 281 Ala. 542 in **Shuttlesworth v. City of Birmingham.**

The Commission in issuing parade permits under the provisions of Section 1159:

1. May not censor what is to be said or displayed.

2. Must be guided only by safety, comfort and convenience of persons using the streets, sidewalks and other public ways.

3. A denial would be warranted only if after investigation, it is found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed.

4. May be applied only when a formal procession or march occurs.

5. A permit may not be refused solely on the ground that a parade, procession or other public demonstration might tend to provoke disorderly conduct.

6. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed.

If they should act arbitrarily, resort may be had to the courts. 206 So. 2d 350-352.